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KEYNOTE ADDRESS

The American Death Penalty: Constitutional Regulation as the Distinctive Feature of American Exceptionalism

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After a long period of stability, the American death penalty looks newly fragile. Several jurisdictions have recently abandoned the death penalty following years of state legislative inactivity. Death sentencing has declined, as have executions. Although the size of the nation's death row has swelled, many of the condemned face no realistic prospect of execution. Popular support for the death penalty appears more tenuous. Many of our "peer" countries have abandoned the death penalty. Perhaps most importantly, after years of indifference, the U.S. Supreme Court has revealed a new willingness to examine state death penalty practices.

The year, of course, is 1968. The end of *that* story is familiar. The Court briefly flirted with judicial abolition—invalidating essentially all prevailing statutes on Eighth Amendment grounds in 1972. But the state legislative backlash, fueled by rising rates of violent crime, led to new state capital statutes. The Court affirmed the basic constitutionality of the death penalty four years later and sought to cure its acknowledged defects through a web of regulation, inaugurating what we now regard as the "modern era" of capital punishment.

Today, after three and a half decades of judicial regulation, we find ourselves in seemingly familiar territory. The American death penalty

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looks newly fragile. Several jurisdictions—New Jersey, New Mexico, Illinois, and Connecticut—have recently abandoned the death penalty following years of state legislative inactivity. Death sentencing has dramatically declined—to unprecedented levels in the modern era—and executions have declined significantly as well from their turn-of-the-millennium highs. Although the death-row population has climbed dramatically over the past four decades, many of the condemned face no realistic prospect of execution. Popular support for the death penalty appears more tenuous with the emergence of concerns about wrongful convictions. Virtually all of our peer countries—and all Western democratic ones—have abandoned the death penalty. Again, perhaps most importantly, if importance is measured by its relation to the likelihood of abolition, the U.S. Supreme Court recently has demonstrated a new willingness to examine state death penalty practices, after two decades of doctrinal retrenchment. Will this time be different?

My argument today is that the reforms and transformations of the modern era are much more threatening to the continued retention of the death penalty than the reforms and transformations of previous eras. In the past, reform and abolition have not necessarily been on the same track, notwithstanding the view of some commentators that past reforms were essentially the harbingers or evolutionary stages of abolition. As recently as two decades ago, regulation of the death penalty seemed congenial to retention, as the reforms appeared to legitimize and entrench state capital practices. But the same regulatory reforms of the modern era that gave new life to the American death penalty now contribute significantly to its destabilization. Doctrines and institutions produced by constitutional litigation have slowly created an environment less hospitable to the continued robust use of the death penalty and provide a blueprint for further reform or even abolition, but in ways that were not anticipated by the initial reformers.

This keynote will offer a brief history of capital reforms in the United States and argue that most reforms were not clearly or inevitably linked to abolition of the death penalty. Contemporary reforms, on the other hand, appear to pose a more substantial threat to continued retention of the death penalty. Many scholars have observed that the United States is exceptional in its continued retention of capital punishment. Our true exceptionalism, though, is in the contemporary project of extensive *regulation*. The looming question is whether our *regulatory* exceptionalism is compatible with our *retentionist* exceptionalism. For the reasons that follow, I argue that the forms of regulation of the modern era might well lead to a new (and exceptional) path to abolition.

EARLY REFORM

Given the present status of the United States as the lone Western democracy that retains the death penalty, it is easy to lose sight of the quite early efforts of American civic leaders and American jurisdictions to reform the death penalty and ameliorate its harshness. At the time of the founding, the American states all authorized capital punishment, having inherited the punishment from England as the ordinary response to murder. Our Constitution appears to presume the existence of the penalty with the reference to deprivations of "life" in the Due Process and Double Jeopardy Clauses and the explicit mention of "capital" crimes in the grand jury clause.[1] The death penalty was available for many crimes apart from murder—burglary, rape, manslaughter, arson—though not so many as the famously long list of capital crimes in England.

The same Enlightenment forces and republican ideologies that contributed to our Revolution also generated skepticism about the efficacy and desirability of the death penalty. Many of our founders—including James Madison, Thomas Jefferson, Benjamin Franklin, and Benjamin Rush—were familiar with Cesare Beccaria's path-breaking critique of the death penalty[2] and accordingly advocated restriction or abolition of capital punishment.[3] Perhaps the first and most significant reform of the American death penalty came in Pennsylvania, with the decision to recognize "degrees" of murder. That decision was wholly designed to limit the reach of the death penalty, with only murders in the first degree authorizing the punishment of death.[4]

Pennsylvania's innovation spread to many other states,[5] and its decision in the 1790s to protect even some *murderers* from the death penalty was a quite radical transformation. Pennsylvania's decision was palatable in part because of the emergence of the penitentiary, which provided incarceration as an alternative to the physical punishments and fines that had been the staple of eighteenth-century punishment. Pennsylvania's recognition of degrees of murder was followed by the decision of many states, including Pennsylvania, to make many previously capital crimes non-capital. In the early nineteenth century, many North-

1. U.S. CONST. amend. V.

2. *See* CESARE BECCARIA, OF CRIMES AND PUNISHMENTS (Jane Grigson trans., Marsilio Publishers 1996) (1764).

3. STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 91–97 (2002); HERBERT H. HAINES, AGAINST CAPITAL PUNISHMENT: THE ANTI-DEATH PENALTY MOVEMENT IN AMERICA, 1972–1994, at 7 (1996).

4. HUGO ADAM BEDAU, THE DEATH PENALTY IN AMERICA 4 (3d ed. 1982) (recounting how William Bradford, Pennsylvania's Attorney General, proposed the division of murder into degrees with the understanding "[t]hat no crime whatsoever hereafter committed (except murder of the first degree) shall be punished with death in the State of Pennsylvania").

5. *Id.*

ern jurisdictions eliminated the availability of the death penalty for rape, robbery, burglary, and arson—to the point that treason and murder became the sole capital offenses in Northern states by 1860.[6] In the South, too, the number of capital crimes was restricted—at least as applied to white persons, though the death penalty was available for a wider range of crimes for African-Americans (both free and slave).[7]

Although some proponents of narrowing the range of death-eligible crimes were likely motivated by broader opposition to the death penalty,[8] many others urged such narrowing to *protect* the death penalty. This is a recurrent theme surrounding American death penalty reform—the uneasy alliance between abolitionists and retentionists to *improve* the American death penalty.[9] From the retentionist perspective, broad death-eligibility frequently caused prosecutors, judges, and especially jurors to resist convicting "guilty" offenders based on the perceived excessiveness of the punishment. Excessively harsh availability of the death penalty, evident in the recourse to this sort of nullification, tended to undermine the death penalty. Thus, for retentionists, narrowing the death penalty was a means of strengthening the death penalty rather than a step toward eliminating it. More generally, reform of the death penalty was often inspired not necessarily by concerns about the death penalty per se, but triggered by a larger shift in attitudes regarding the causes of crime and the purposes of punishment. The movement to penitentiaries, reflecting a greater confidence in the prospects for rehabilitation (and a correspondingly diminished belief in fundamental depravity), rendered the death penalty less appropriate or necessary for a wide range of offenders.[10]

The second significant reform of the death penalty, related to the first, was the decision of American jurisdictions to give sentencers the choice to withhold the death penalty—even for offenders convicted of first-degree murder. The introduction of discretion was in part motivated

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6. BANNER, *supra* note 3, at 131.

7. *Id.* at 139 ("By the Civil War capital punishment for whites was, with a few exceptions, in practice reserved for murder throughout the South nearly as much as in the North.").

8. At the same time that many American jurisdictions were narrowing the reach of the death penalty, a few others were abolishing it altogether. Michigan abolished the death penalty in 1846 for all crimes other than treason, followed closely by total abolition of the death penalty in Rhode Island (1852) and Wisconsin (1853). BEDAU, *supra* note 4, at 21. Michigan is thus regarded as "the first English-speaking jurisdiction in the world" to achieve abolition. *Id.*

9. *See, e.g.*, BANNER, *supra* note 3, at 156 (describing death penalty opponents' fear of improving and thereby stabilizing capital punishment).

10. *See* LOUIS P. MASUR, RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776-1865, at 5 (1989) (arguing that recourse to the penitentiary instead of executions reflected a "new understanding of crime and punishment" according to which "social influences, not depravity, caused crime and that reformation, not retribution, should govern punishments").

by the same impulse to reduce the number of capital crimes—the fear that jurors would "nullify" to avoid imposition of the death penalty in particularly undeserving cases.[11] The movement toward discretion was a long process—initiated in Tennessee in the 1830s and gradually embraced universally by capital jurisdictions over a lengthy period (right up to the 1950s and 1960s).[12]

The third major capital reform was the movement of public executions inside jail or prison walls. Again, this reform was not primarily or even significantly a reflection of widespread doubts about the wisdom of the death penalty; rather, the emergence of a middle class in the nineteenth century, which cultivated a sense of refinement and culture, regarded public executions as the province of the "lower" elements of society.[13] Public executions were no longer regarded as religious, edifying rituals (characterized by solemn sermons), but instead were viewed as raucous, raw spectacles (although it is not altogether clear that the actual practice had changed that significantly). This newly emerging sensibility caused states to require the removal of executions from public view beginning in the 1830s. By 1860, all Northern states, as well as Georgia, had abolished public hangings, and much of the South banned such hangings by the end of the nineteenth century.[14]

Abolitionists often supported privatizing executions to demonstrate their lack of utility as a deterrent.[15] Indeed, this argument had something of a self-fulfilling character because the prevailing deterrent value of executions was likely diminished by privatization. But death penalty supporters also embraced privatization based partly on a fear that the unfavorable publicity surrounding particularly raucous or unseemly executions would threaten the continued practice.[16] In part, the movement from public to private executions reflected the changing role of capital punishment. As the political and religious roles of the death penalty diminished, and the death penalty became less a symbol of state or church authority than an ordinary exercise of modernizing criminal jus-

11. Philip English Mackey, *The Inutility of Mandatory Capital Punishment: An Historical Note*, *in* CAPITAL PUNISHMENT IN THE UNITED STATES 49, 49–51 (Hugo Adam Bedau & Chester M. Pierce eds., 1976).

12. BEDAU, *supra* note 4, at 9–12.

13. *See* JOHN D. BESSLER, DEATH IN THE DARK 43 (1997) (describing legislative motivation to curtail the "spectacle" of executions and their "demoralizing" effects); MASUR, *supra* note 10, at 96.

14. BANNER, *supra* note 3, at 154–55.

15. *See* BESSLER, *supra* note 13, at 44–45 (quoting a Massachusetts legislative report stating that the "privatization of executions was 'a virtual abandonment of the argument that capital punishment is calculated to deter from the commission of crime'" and describing privatization as an "entering wedge" by opponents of the death penalty).

16. *Id.* at 71 (noting that "many private execution laws were enacted in the midst of credible legislative attempts to abolish capital punishment entirely").

tice systems, the need for public execution ceremonies likewise diminished.[17] In this respect, the decision to remove executions from public view thus signaled a different *role* for capital punishment rather than an emerging desire to end the practice altogether.

Some Southern jurisdictions retained public hangings for rape in the early twentieth century in part, perhaps, to prevent lynching. One of the last public executions was conducted in Kentucky in 1936. Although the defendant had committed murder as well as rape, he was charged only with rape so that his execution could be conducted in public view; Kentucky law punished murder with electrocution in the state penitentiary but authorized public local executions for the crime of rape.[18]

The end of public hangings undoubtedly challenged some bases for retaining the death penalty, particularly the role of public hangings in dramatically illustrating to the public the cost of crime. In the end, though, shielding executions from public view also deflected criticism about the barbarity of the punishment and might simply have "adapted" the death penalty to modern sensibilities. As one historian observed, "[s]ome of the death penalty's later opponents looked back with mixed feelings at what they came to see as a bad bargain, in which supporters of capital punishment had bought off much of the opposition by agreeing to remove executions from public view."[19]

The same sensibilities that sought to shield the public from executions also led to efforts to humanize executions by making them less painful and less visibly destructive of the body. Hanging gave way to electrocution beginning in the late 1800s because inexpert hangings could lead to prolonged death, decapitation, or some other mishap. Despite the fact that the first electrocution was botched, refinements of the electrocution method led to greater enthusiasm for the practice, and many states moved from hanging to electrocution in the half century or so between 1890 and 1950.[20] Some states also moved to lethal gas (as an alternative to either hanging or electrocution) because of the apparent minimal pain and minimal destruction of the body; hanging could crush the neck, electrocution could cause burns. More recently, virtually all jurisdictions have moved to lethal injection—again based on a desire to inflict minimal pain and minimal visible injury. Whereas in the past, part of the punishment of death was the execution itself—the pain, humilia-

17. DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION 87–95 (2010) (describing the emergence of the "modern mode" of capital punishment in the nineteenth century).

18. *See* BANNER, *supra* note 3, at 155–56; *10,000 See Hanging of Kentucky Negro*, N.Y. TIMES, August 15, 1936.

19. BANNER, *supra* note 3, at 156.

20. WILLIAM J. BOWERS, EXECUTIONS IN AMERICA 9–11 (1974).

tion, and degradation—in the late nineteenth and twentieth centuries, the punishment of death gradually became the loss of life, not the manner of death. As in the other reforms discussed above, humanizing executions to make them less painful and less destructive of the body was not seen as hostile to capital punishment itself by its supporters, but rather a means of accommodating the death penalty to modern sensibilities, again reflecting the somewhat changing role of the death penalty.

The final reform of the death penalty in the pre-modern era involved the centralization of executions—their movement from local administration by county officials to state administration in state penitentiaries. Centralization was partly motivated by the replacement of hangings with other forms of execution such as electrocution and lethal gas, which required more expertise to administer. Cost was likely an additional factor as it simply was not cost-effective or feasible for local counties to own and operate their own electric chairs or gas chambers. Centralization of executions also reflected a more general transition from local, communal criminal justice practices to more bureaucratic, hierarchical structures characteristic of modernizing societies. As with the other reforms, few participants in the decisions of every state to shift executions from the county to the state level, or contemporary observers of those transitions, would have understood the movement of executions to state prisons as an *abolitionist* development or as a reform that in any significant way called into question the institution of capital punishment itself.

Even though the reforms discussed above—narrowing of death-eligibility, permitting discretionary grants of mercy, and concealing, humanizing, and centralizing executions—were not primarily understood as abolitionist measures, there nonetheless is the possibility that the reforms put us on the path to abolition or reflected values that are inevitably inconsistent with the continued use of the death penalty. This sort of claim can be divided into two hypotheses. The weaker of the two offers a highly deterministic view of these reforms. On this view, the reforms entail the seeds of the death penalty's destruction. Narrowing the scope of death-eligibility and requiring the exercise of discretion in sentencing limit the total number of death sentences, making the practice more confined, more fragile, and more subject to question. The process of concealing, humanizing, and centralizing executions transforms executions into marginal events marked by state shame instead of robust, collective, social practices. On this account, deprived of its powerful practical and symbolic roles, and routinely replaced by imprisonment for many categories of offenses, the death penalty was placed on a path of inevitable decline and eventual abolition.

A corollary to this argument is the observation that most, if not all, of the reforms described above were adopted in many other countries more or less at the same time as in the United States, and in all other Western democracies the reforms were eventually followed by the declining use and eventual abolition of the death penalty. Hence, on this view, the United States is simply lagging behind other countries along the same path, and the reforms will function as important causal contributors to eventual abolition.

The problem with these hypotheses is that the reforms have in the past and in the present happily coexisted with retention. Narrowing the death penalty to murder has not diminished significantly the potential pool of the condemned, in part because the United States experiences a great deal of murder. The humanizing, concealing, and centralizing of executions has not triggered much abolitionist momentum. Indeed, there were far more cries of "hypocrisy" at the time these reforms were embraced than in contemporary American discourse. Opponents of the death penalty rarely draw attention to the muted spectacle executions have become, perhaps fearing that the likely response would be to advocate a reversion to harsher, more public forms of execution.

Moreover, the deterministic, causal thesis is undermined by the sheer time that has elapsed since the adoption of the major pre-modern reforms. The narrowing of death penalty eligibility to murder (and rape in the South) began in the eighteenth century and was virtually complete by the early twentieth century, in practice if not in law. Concealing executions also began almost two centuries ago, and was fully accomplished by the 1930s. The process of humanizing executions has been an ongoing process that dates back at least a century, as does the centralizing of executions. Thus, although many countries that have abolished the death penalty adopted many of these same reforms and arrived on an abolitionist path, it is hard to say that these reforms in any meaningful sense "caused" abolition.

A more modest and more plausible account views the reforms of the pre-modern era as the product of a set of values that powerfully motivated abolition in other countries. Even if those reforms did not "cause" abolition in other countries, the values that produced those reforms and abolition elsewhere will likely motivate abolition here as well. On this view, the civilizing, humanizing, and bureaucratic impulses that narrowed the death penalty, centralized its administration, and animated efforts to reduce its pain and horror, are values that inevitably undermine the continued use of the death penalty.

From this perspective, though there may be bumps along the abolitionist road in the United States based on some distinctive aspects of

American politics, federalism, or rates of victimization and violence, eventually "civilizing" and "humanizing" impulses will win out. Though there is much to recommend this view, there is a strong case on the other side. The centerpiece of that case is the notable lack of any strong human rights-based or human dignity-based critique of the American death penalty in contemporary American discourse. The United States prides itself as a democratic, egalitarian, rights-based society, and yet few contemporary opponents of the American death penalty appear to claim that the punishment is contrary to some fundamental notion of civilization or humanity. Indeed, such critiques of the death penalty on the grounds of human dignity or essential human rights appeared much more frequently in the discourse of earlier American eras. When Minnesota discussed abolition at the end of the nineteenth century, one legislator described the death penalty as "this harlot of judicial murder [that] smear[s] the pages of our history . . . [and] trail[s] her crimson robes through our Halls of Justice."[21] In the debates that led to abolition in Michigan in the 1840s, the committee recommending abolition declared, "[N]o man hath a power to destroy life but by commission from God, the author of it."[22]

These are not the sort of sentiments frequently aired in or endorsed by contemporary legislatures (particularly in retentionist states). In fact, most of the anti-death penalty discourse in contemporary debates is pragmatic and utilitarian rather than rooted in deontological conceptions of human rights or religious commands. Opponents of the death penalty emphasize its cost, its arbitrary or discriminatory distribution, and the risk of executing the innocent. Moreover, the pragmatic focus has been self-consciously embraced in light of the widespread perception that Americans have much less discomfort with capital punishment as a punishment than with its prevailing administration. Along these lines, the National Coalition to Abolish the Death Penalty, a leader in American anti-death penalty advocacy, tellingly propounds "Ten Reasons Why Capital Punishment is *Flawed Public Policy*" as the centerpiece of its web-based advocacy.[23] Even the two human rights-based and religious-based arguments appearing on that list ("Capital Punishment goes against almost every religion" and "The U.S. is keeping company with notorious human rights abusers"[24]) seem to be one step removed from

21. BESSLER, *supra* note 13, at 125 (internal quotation marks omitted).

22. JOHN F. GALLIHER ET AL., AMERICA WITHOUT THE DEATH PENALTY 15 (2002) (internal quotation marks omitted).

23. *Death Penalty Overview: Ten Reasons Why Capital Punishment is Flawed Public Policy*, NAT'L COALITION TO ABOLISH DEATH PENALTY, http://www.ncadp.org/index.cfm?content=5 (last visited Oct. 10, 2012) (emphasis added).

24. *Id.*

directly asserting the *immorality* of the death penalty.

The reluctance to condemn the death penalty on absolutist moral grounds is perhaps best illustrated by the tact of contemporary American opponents to advocate legislative "repeal" of the death penalty rather than using the morally fraught term "abolition."[25] Such a strategy avoids the implication that the decision to end the practice is morally compelled to the same extent as the duty to end slavery. "Repeal" also suggests that the decision to withdraw the death penalty need not be a permanent or irreversible one.

Thus, while the reforms of the pre-modern era might carry the seeds of an attack based on emerging norms of civility and humanity, those seeds do not appear to be particularly ripe. And though we have traveled on the same road as most abolitionist states in many of our common reforms, it is not obvious that the road cannot maintain a divide at the end, with one abolitionist path and the other retentionist. The question remains whether the reforms of the present era—most of which are distinctive to the American experience—are similarly able to coexist with retention.

REFORMS OF THE MODERN ERA

The modern era of the death penalty was inaugurated by the striking decline in death sentences and executions in the 1960s. Those declines, together with a myriad of social and political forces, including the Civil Rights Movement and the Vietnam War, prompted a rethinking of the role of capital punishment in America. Prior to the late 1950s, the United States had experienced a four-decade period in which no American state had abolished the death penalty.[26] But over the next decade, Alaska and Hawaii entered the Union as abolitionist states (having abolished the death penalty as territories just before statehood), and Delaware, Oregon, Iowa, West Virginia, Vermont, and New York all abolished the death penalty for ordinary murder, with some of those states securing total abolition.[27]

In addition to these political developments, the death penalty for the first time in American history became subject to significant *legal* regulation. The U.S. Supreme Court first signaled the possibility of meaningful federal constitutional regulation in 1963, when three justices

25. Carol S. Steiker & Jordan M. Steiker, *Capital Punishment: A Century of Discontinuous Debate*, 100 J. CRIM. L. & CRIMINOLOGY 643, 675–76 (2010) [hereinafter Steiker & Steiker, *Century*].

26. Bowers, *supra* note 20, at 7. Delaware abolished the death penalty in 1958 but reinstated it in 1961. *Id.*

27. *Id.* at 6–7.

urged the Court (unsuccessfully) to decide whether the death penalty is excessive when imposed for the crime of rape.[28] Just a year before, the Court had "incorporated" the Eighth Amendment's prohibition of cruel and unusual punishments and applied it against the states via the Fourteenth Amendment's Due Process Clause.[29]

Emboldened by the apparent interest of some members of the Court in regulating the American death penalty, and as well by the Warren Court's dramatically increasing role in supervising state criminal processes, the NAACP Legal Defense Fund launched an attack on capital punishment, in part because of its manifestly discriminatory administration, particularly in rape cases. The LDF, through its "moratorium strategy" of challenging capital sentences in every jurisdiction based on all available constitutional grounds, managed to bring executions to a halt by 1967.[30] Five years later, in *Furman v. Georgia*,[31] the U.S. Supreme Court invalidated prevailing capital statutes based largely on their failure to guide sentencer discretion; states had authorized the death penalty for a wide range of crimes, including murder and rape, yet only a fraction of persons convicted of such offenses had actually been sentenced to death (much less executed).[32] The looming gap between death-eligibility and actual sentencing practices, together with the failure of states to endorse any conception of "the worst of the worst" offenses or offenders, led the Court to find the status quo intolerably arbitrary.[33] Only two Justices—Brennan and Marshall—concluded that the death penalty was in all cases contrary to evolving standards of decency,[34] and in the wake of the Court's decision, states passed new capital statutes with an eye toward limiting or abolishing sentencer discretion to comply with the Court's mandate.[35] Four years later, in 1976, the Court reviewed five of the new statutes, upholding three schemes that confined the death penalty to "aggravated" murder via specially enumerated circumstances, and striking down two schemes that made the death penalty

28. Rudolph v. Alabama, 375 U.S. 889, 889–91 (1963) (Goldberg, J., joined by Douglas and Brennan, JJ., dissenting from denial of certiorari).

29. Robinson v. California, 370 U.S. 660, 667 (1962) (holding incarceration to be excessive punishment for the crime of "addiction" to a controlled substance).

30. *See* MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 106–08, 113–14 (1973) (describing moratorium strategy).

31. 408 U.S. 238 (1972) (per curiam).

32. *See* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 364–69 (1995) [hereinafter Steiker & Steiker, *Sober*] (describing the constitutional concerns supporting the result in *Furman*).

33. *See id.*

34. *See id.* at 362.

35. *Id.* at 363.

mandatory for certain offenses.[36]

The "modern" American death penalty consists of the regime produced in the wake of the Court's landmark decisions in 1972 and 1976 and its subsequent (and continuing) regulatory efforts. Those decisions spawned numerous core doctrines, including the requirements that states "narrow" the class of the death-eligible through the use of at least one non-vague aggravating factor,[37] that states facilitate robust consideration of a defendant's mitigating evidence (broadly construed),[38] and that states withhold the death penalty from offenders deemed undeserving by contemporary standards (including juveniles,[39] persons with mental retardation,[40] persons convicted of rape and other non-homicidal ordinary offenses,[41] and persons convicted based on the actions of another who were not themselves major participants in the offense[42]). In addition, the Court has developed numerous doctrines regulating other fundamental aspects of capital proceedings, such as the selection and exclusion of potential capital jurors[43] and the minimal requirements for effective capital investigation and representation.[44] In the dozens—indeed hundreds—of capital cases in which the Court has issued merits decisions over the past four post-*Furman* decades, the Court has addressed many other aspects of capital litigation, including permissible types of prosecutorial argument,[45] the circumstances under which death-sentenced inmates may assert their factual innocence based on newly-discovered evidence,[46] and the requisite mental bearing for condemned prisoners at the time of their execution.[47]

Looking back from the present, it is clear that the foundational cases of the 1970s heralded a new era in which courts would play a much more substantial role in the American capital system. The proliferation of doctrines and sub-doctrines touching all aspects of the capital process—from the investigation of crime, the conduct of both prosecutors and defense attorneys, jury selection, jury instructions, and so on—certainly have transformed the American death penalty. However, the

36. *Id.* at 361, 363–70.

37. Zant v. Stephens, 462 U.S. 862, 876–78 (1983).

38. Tennard v. Dretke, 542 U.S. 274, 283–88 (2004).

39. Roper v. Simmons, 543 U.S. 551, 575 (2005).

40. Atkins v. Virginia, 536 U.S. 304, 321 (2002).

41. Kennedy v. Louisiana, 554 U.S. 407, 446–47 (2008).

42. Enmund v. Florida, 458 U.S. 782, 798 (1982).

43. *See* Morgan v. Illinois, 504 U.S. 719, 728–29, 735, 739 (1992); Witherspoon v. Illinois, 391 U.S. 510, 521–22 (1968).

44. Rompilla v. Beard, 545 U.S. 374, 383–86, 389–90 (2005); Wiggins v. Smith, 539 U.S. 510, 533–34. 538 (2003); Williams v. Taylor, 529 U.S. 362, 396, 398–99 (2000).

45. Caldwell v. Mississippi, 472 U.S. 320, 323 (1985).

46. Herrera v. Collins, 506 U.S. 390, 400, 404, 411 (1993).

47. Ford v. Wainwright, 477 U.S. 399, 409–10 (1986).

most important changes might not be reflected in the *content* of those doctrines so much as the *process* by which they are enforced. Indeed, the actual requirements imposed on states in administering the death penalty are less strenuous than the legions of cases heard and decided by the U.S. Supreme Court would suggest.[48] A disproportionate number of those cases focus less on the substantive commands of the Eighth and Fourteenth Amendments than on procedural questions surrounding their enforcement.[49] In 1996, with the passage of the Antiterrorism and Effective Death Penalty Act,[50] Congress substantially curtailed the ability of federal courts to engage in de novo review of state court decisions denying relief on federal claims. Over the past fifteen years, the lower federal courts and the U.S. Supreme Court have spent an extraordinary amount of time analyzing the consequences of those changes, and a significant percentage of federal habeas litigation is devoted to ascertaining *whether* the federal courts can reach the merits of constitutional claims surrounding the implementation of the death penalty (as opposed to the merits themselves).[51]

The *constitutionalization* or *legalization* of the death penalty—the process of subjecting every aspect of the capital process to federal legal norms and standards (even if quite minimal)—has created a new cadre of lawyers specializing in capital litigation. Many active death penalty states have transferred the responsibility for defending capital convictions and sentences from local district attorneys to lawyers within state attorney general offices who have particular knowledge about the operation of federal habeas and constitutional law applicable to the death penalty.

On the defense side, capital trial representation, state post-conviction representation, and capital litigation in federal habeas have become distinct professional roles. Before the modern era, capital cases were handled by appointed lawyers who generally had no specialized knowledge or training related to the death penalty (or post-conviction procedure). Capital appeals and post-conviction were likewise handled by "generalist" lawyers with no particular training or expertise. The LDF's efforts in the 1960s marked the first time in American history that capital litigation became a distinctive practice, and the Court's decisions

48. Steiker & Steiker, *Sober*, *supra* note 32, at 402 (describing the quite minimal demands of contemporary capital doctrines, notwithstanding their complexity).

49. Jordan Steiker, *Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U. CHI. LEGAL F. 315, 317 (1998).

50. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, tit. I, sec. 107(a), 110 Stat. 1214, 1221(amending 28 U.S.C. § 153 (1994)).

51. Steiker, *supra* note 49, at 315–17.

announcing constitutional limitations on the death penalty generated a need for greater specialization and training. The transformation of capital representation has taken several decades (it was still not uncommon for "generalist" lawyers to represent capital defendants at trials in the 1970s and early 1980s). Today, though, a group of professional capital litigators engages in direct representation and post-conviction representation of capital defendants and inmates, and these litigators also provide support and consulting for private criminal defense lawyers who work on these cases. This is not to say that every capital case is actually litigated by expertly-trained and professionally-committed capital litigators. But many dozens—indeed hundreds—of these professionals are involved in capital litigation nationwide, and their presence reinforces the role of legal regulation in the American death penalty. Just as the LDF shared pleadings and strategies in its moratorium effort, so too do contemporary capital litigators collaborate in designing and refining legal claims (as well as conducting trainings to ensure wide availability of the prevailing standard of practice). As a result, in many, if not most, capital cases, the work of professional capital litigators will be reflected in the range and quality of claims raised and litigated through multiple stages of the process.

A particularly telling example of the coordination and sophistication of capital defense lawyers can be found in the recent rounds of lethal injection litigation. Claims surrounding lethal injection protocols have been pursued vigorously in virtually every death penalty jurisdiction in the country with significant success in forcing jurisdictions to reconsider or redesign their procedures, notwithstanding the U.S. Supreme Court's rejection of a challenge to Kentucky's lethal injection protocol in 2008.[52]

Overall, the Court's articulation of an extensive body of capital doctrines as well as a dense thicket of procedural rules governing their enforcement has transformed the American death penalty most fundamentally by extending the time between death sentences and executions. Throughout most of our history, weeks or maybe months separated the pronouncement of sentence and the ultimate execution.[53] Today, the separation is measured by years or decades in *active* executing states.[54] In a larger group of inactive states, the separation is simply immeasurable because the imposition of legal constraints (in conjunction with other political and social forces) has created a de facto moratorium on executions (except, perhaps, for "volunteers" who seek execution by waiving

52. Baze v. Rees, 553 U.S. 35, 41 (2008) (plurality opinion).

53. Steiker & Steiker, *Century*, *supra* note 25, at 663.

54. *Id.* at 679.

their appeals).[55] Constitutionalization and proceduralization have created the new "death row phenomenon": long-term confinement by many prisoners awaiting execution.[56] Whereas the accumulation of inmates in the late 1960s reached about 600 inmates nationwide,[57] which was regarded as an extraordinary number at that time, today there are several thousand inmates languishing on death row (more than 700 in California alone[58]).[59]

This phenomenon destabilizes the death penalty in numerous ways. First, extending the time between sentence and execution undercuts two of the most pressing pro-death penalty arguments: deterrence and retribution. Deterrence is attenuated when it is widely understood that an execution will not occur until many years after sentence, if at all. Moreover, the retributive value of executions is diminished when the person executed has lived a "second lifetime" on death row.[60] Given that the death-sentencing decision now encompasses a broad inquiry into a defendant's background and character, a lengthy gap between sentence and execution necessarily excludes relevant information—for example, the second life lived—from the sentencing decision (and clemency is a poor substitute for updating the death-worthiness of the condemned). In more colloquial terms, the death row phenomenon has prompted deep psychological questions about whether a person executed twenty years after the offense and sentence is the "same" person that had been condemned two decades earlier.

Second, the death-row phenomenon creates a new moral problem for the death penalty, one that Justice Breyer[61] and former Justice Stevens[62] have highlighted on several occasions. The death penalty now has become two separate punishments: lengthy incarceration under very severe conditions (essentially solitary confinement in many states) fol-

55. *See* Carol S. Steiker & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in "Executing" Versus "Symbolic" States in the United States*, 84 TEX. L. REV. 1869, 1870–73 (2006) [hereinafter Steiker & Steiker, *Tale*].

56. Steiker & Steiker, *Century*, *supra* note 25, at 677–78.

57. *Death Row Inmates by State and Size of Death Row by Year*, DEATH PENALTY INFO. CENTER (April 1, 2012), http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year.

58. *Id.*

59. Steiker & Steiker, *Tale*, *supra* note 55, at 1870.

60. *See* Johnson v. Bredesen, 130 S. Ct. 541, 543 (2009) (Stevens, J., joined by Breyer, J., statement respecting denial of certiorari).

61. *See, e.g.*, Knight v. Florida, 528 U.S. 990, 993 (1999) (Breyer, J., dissenting from denial of certiorari); Elledge v. Florida, 525 U.S. 944, 945 (1998) (Breyer, J., dissenting from denial of certiorari).

62. Johnson, 130 S. Ct. at 542 (Stevens, J., joined by Breyer, J., statement respecting the denial of certiorari); Thompson v. McNeil, 556 U.S. 1114–16 (2009) (Stevens, J., statement respecting denial of certiorari).

lowed by an execution.[63] Even if the public and courts are persuaded that the death penalty itself is not an excessively cruel punishment, there are increasing doubts about whether the present regime of lengthy solitary confinement and subsequent execution is tolerable.

Third, the extensive legal regulation surrounding the death penalty, with more substantial trials, lengthy appeals, and functionally indeterminate sentences, has exponentially increased the cost of capital punishment. Whereas "cost" was traditionally a pro-death penalty argument (why should the state spend money housing inmates for life?), cost has become decisively an anti-death penalty argument as the modern regulatory apparatus imposes severe costs that are difficult if not impossible to curb.[64] Over the past three to five years, concerns about the cost of capital punishment have become a driving force behind efforts to repeal the death penalty, and such concerns have contributed to the decisions of prosecutors to forego capital sentences, with dramatic declines in death sentencing over the past decade.

Part of the increase in capital costs is attributable to the emergence of mitigation as the primary focus of capital litigators. Prior to the modern era, the focal point of capital trials, like their non-capital counterparts, was the question of guilt versus innocence. Most states did not allow the presentation of evidence unrelated to guilt or innocence,[65] and lawyers in capital cases did little if any investigation unrelated to the commission of the offense. Lawyers in capital cases were not typically what we would today call "death penalty lawyers"; they tended to be generalists who approached capital cases in the same way they would approach other serious felony cases.[66]

When the U.S. Supreme Court invalidated mandatory capital statutes in 1976,[67] the Court constitutionalized the requirement of individualized sentencing. In one respect, the Court was simply recognizing the national norm of discretion in capital cases, given the near-uniform rejection of mandatory death-sentencing provisions by the 1960s.

But, in its elaboration and enforcement of a right to individualized sentencing, the Court broadened considerably the range of evidence rele-

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63. Steiker & Steiker, *Century*, *supra* note 25, at 677–78.

64. Carol S. Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL F. 117, 120, 136–37 (2010) [hereinafter Steiker & Steiker, *Cost*].

65. MELTSNER, *supra* note 30, at 68.

66. *Cf.* Carol S. Steiker, *Darrow's Defense of Leopold and Loeb: The Seminal Sentencing of the Century*, *in* TRIAL STORIES 117, 119, 122–24, 133 (Michael E. Tigar & Angela J. Davis eds., 2007).

67. Roberts v. Louisiana, 428 U.S. 325, 331, 336 (1976) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 301, 305 (1976) (plurality opinion).

vant to the punishment decision.[68] Moreover, the "professionalization" of the capital litigation bar in response to the Court's regulatory efforts significantly changed the scope and scale of trial defense efforts. Prior to the 1970s, punishment phase investigation and advocacy was rudimentary and secondary. By the late 1980s, the emerging norm for capital trial representation included a comprehensive evaluation of a defendant's life and circumstances. In 1989, the American Bar Association promulgated detailed standards for the appointment and performance of counsel in capital cases.[69] Those standards outlined the wide range of tasks necessary to effective capital trial representation, including investigation into a defendant's medical history, educational history, special educational needs, military service, employment and training history, family and social history, and religious and cultural influences. Fourteen years later, in its revised guidelines, the ABA described even greater responsibilities, recognizing that effective capital representation requires the coordination of a capital punishment team, including a professional investigator, a "mitigation specialist," and all other pertinent professional experts.[70] The defense approach contemplated under the standards includes vigorous efforts to seek a plea based on extensive mitigation investigation, aggressive pre-trial motion practice to assert all non-frivolous challenges to the prosecution's evidence and the state capital scheme, and informed jury selection efforts to ensure reasonable consideration of mitigation evidence. Acknowledging that this sort of representation requires states to commit "substantial resources" to capital trial defense, the ABA remarked "that any other course has weighty costs—to be paid in money and delay if cases are reversed at later stages or in injustice if they are not."[71]

The transformation of capital trial defense, reflected in the ABA standards (though not fully in capital practice) has been destabilizing to the continued use of the death penalty in at least two ways. First, like the additional layers of procedural safeguards wrought by increased legal regulation, the emergence of robust individualization and other trial preparation standards has dramatically raised the cost of capital punishment.[72] Capital trial costs are stunningly greater than their non-capital

68. *See* Jordan M. Steiker, Penry v. Lynaugh*: The Hazards of Predicting the Future, in* DEATH PENALTY STORIES 277, 306–10 (John H. Blume & Jordan M. Steiker eds., 2009) (describing the expansion of the Court's individualization principle).

69. ABA, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 916 (2003) (discussing the process of updating the original guidelines adopted in 1989).

70. *Id.* at 916, 925.

71. *Id.* at 930.

72. Steiker & Steiker, *Cost*, *supra* note 64, at 139–41.

counterparts.[73] Second, robust individualization uneasily fits with many traditional and religious defenses of the death penalty because it presumes that "an eye for an eye" is an inappropriate command; the death penalty decision must be as much a judgment about the offender as the offense. As capital representation increasingly becomes a sophisticated, collaborative effort to avoid the imposition of a death sentence, capital punishment becomes less common and indeed less expected as the ordinary response even to aggravated murder. High profile cases yielding life sentences in the wake of extensive mitigation cases, such as those involving Terry Nichols (who participated in the Oklahoma City bombing) and Brian Nichols (who killed a state court judge and others while escaping from his rape trial in a Georgia courthouse), reflect the new reality that no crimes, no matter their severity, are invariably punished by death.

The final major reform in contemporary capital practice has been the emergence of life-without-possibility-of-parole ("LWOP") as the primary alternative punishment to the death penalty for capital crimes. Prior to the 1970s, LWOP was essentially non-existent within the United States.[74] LWOP first emerged in a few states in response to *Furman*'s invalidation of prevailing capital statutes, but its widespread adoption in subsequent decades was driven by broader considerations. The rise of violent crime in the 1970s and 1980s, increasing skepticism about the rehabilitative role of prisons, and frustration with the lack of transparency in criminal sentencing all contributed to more punitive sentencing regimes, which included fewer opportunities for parole. Although death penalty opponents tended to support LWOP in death penalty states in hopes of reducing capital sentences, the movement toward LWOP was a crashing wave, embraced in states without the death penalty, as well as for certain non-capital offenses in states that retained the death penalty. But death penalty supporters recognized the danger LWOP poses for the death penalty. In Texas, prosecutors resisted LWOP for years, and reluctantly capitulated only after the U.S. Supreme Court invalidated the death penalty for juveniles, fearing an insufficiently punitive or protective alternative to death in capital cases involving juveniles.[75]

Although the recent, ubiquitous embrace of LWOP is not primarily attributable to concerns about the death penalty, its effects on the death penalty have been dramatic. The emergence of LWOP is likely the sin-

73. *See generally id.* at 137–50 (detailing the "new cost" of capital punishment).

74. Note, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 HARV. L. REV. 1838, 1840 (2006).

75. *Id.* at 1843–44.

gle most important causal factor in the extraordinary decline in American death sentencing over the past fifteen years. The number of new death sentences has dropped almost two-thirds from the number of death sentences obtained in the mid-1990s, from a nationwide average of 314 per year (1994–1996) to a nationwide average of 98 (2009–2011).[76] This past year saw the fewest new death sentences in the modern era, a total of 78 nationwide.[77] LWOP provides substantial cover to prosecutors who forego capital sentences, as it ameliorates concerns about recidivism from the pro-death penalty side. In states like Texas, where a jury must find a likelihood of future dangerousness before imposing the death penalty, the elimination of parole for life-sentenced offenders strikes at the core of the state's justification for retention.

Overall, the combined power of legal regulation, robust mitigation, and the alternative of LWOP has made the death penalty significantly more expensive, less frequently imposed, and less responsive to the death penalty's main justifications. Like the reforms of the pre-modern era, the reforms of the present day were not self-consciously adopted to defeat the death penalty. The imposition of constitutional norms to state capital practices was the natural outgrowth of a larger movement toward nationalizing criminal justice standards; indeed, imposing constitutional safeguards was the *alternative* to constitutional abolition. New legal norms, in turn, transformed capital practices, such that contemporary capital trials and appeals bear little resemblance to their pre-*Furman* counterparts. Some of the transformation resulted from direct judicial command or legislative action (e.g., the establishment of a distinct punishment phase, extensive voir dire, mandatory post-conviction review with appointment of counsel), but some change is attributable to the creation of a professional capital punishment bar which itself was the by-product of increased legal regulation. Likewise, LWOP developed not to limit the death penalty but because of independent considerations.

THE MODERN PREDICAMENT: THE STORM FOLLOWING THE CALM

Is the modern version of the American death penalty a stable practice? Before *Furman*, the death penalty appeared particularly vulnerable. Death-sentencing rates were declining, executions had become virtually non-existent, several jurisdictions had severely restricted or abolished the death penalty, public support for the death penalty (as measured by polling data) had reached an all-time low, other Western democracies

76. *See Death Sentences in the United States from 1977 by State and by Year*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008 (last visited Nov. 13, 2012).

77. *Id.*

were on the precipice of abolition, and the death penalty was under federal constitutional attack. The Court could have issued a fatal blow to the death penalty, instead of its cacophonous, fractured indictment of prevailing capital statutes in *Furman*.[78] *Furman*'s tentativeness, coupled with the dramatic rise in violent crime, fueled a backlash to the Court's decision. Instead of continued decline or constitutional abolition, the death penalty in America was revived. States passed dozens of new capital statutes, the Court affirmed the basic constitutionality of the punishment, and executions resumed less than five years later.

During the two decades following *Furman*, the increased legal regulation of the death penalty likely contributed to its growth. First, the Court's decisions in 1976 upholding the new statutes explicitly disavowed the language in some of the *Furman* concurrences insisting that the death penalty was no longer consistent with evolving standards of decency. In so doing, the Court gave its imprimatur to the continued use of the punishment. As might be expected, the Court's decision did not directly endorse capital punishment; rather, the Court framed its conclusion as addressing the *permissibility* rather than the *desirability* of capital punishment.[79] According to the Court, states were entitled to retain the death penalty on retributivist and deterrence grounds; given these legitimate objectives, the death penalty did not violate human dignity.[80] But in our culture, saying that the Constitution does not forbid a practice often confers a special legitimacy, and the Court's embrace of the new capital statutes undoubtedly contributed to the subsequent decline in anti-death penalty sentiment.

Second, apart from undermining the broad moral attack on the death penalty, the Court's assertion of ongoing regulatory oversight blunted criticism of the states' administration of the death penalty. Whereas prior to *Furman*, state capital systems entrusted the death penalty decision to the unguided discretion of prosecutors and jurors, in the post-*Furman* world states designed new capital statutes that gave structure to the death penalty decision. States enumerated "aggravating factors," which became indispensable to the imposition of a death sentence, and the Court policed the application of such factors in particular cases. As the Court declared in upholding Georgia's new statute in 1976, "[n]o

78. *See* Carol S. Steiker, *Capital Punishment and Contingency*, 125 HARV. L. REV. 760, 780–81 (2012) (reviewing GARLAND, *supra* note 17 (claiming that the United States' failure to abolish the death penalty is more contingent than some scholars claim and describing plausible route to abolition under the Warren Court)).

79. Gregg v. Georgia, 428 U.S. 153, 186–87 (1976) (plurality opinion) ("[W]e cannot say that the judgment of the Georgia Legislature that capital punishment may be necessary in some cases is clearly wrong.").

80. *Id.* at 182–86.

longer can a jury wantonly and freakishly impose the death sentence."[81]

Over the next two decades, the Court reversed death sentences in large numbers of cases, contributing to the perception that the death penalty was subject to too much rather than too little regulation.[82] This perception of "overregulation" became entrenched, notwithstanding the fact that the actual demands of the Court's capital jurisprudence were quite minimal, and the resulting distribution of the death penalty remained quite problematic.[83] Judicial intervention thus stabilized capital punishment and paved the way for executions to resume without the discomfort evident in the pre-*Furman* decade. Indeed, other actors in the capital system—particularly executive officials—appeared to abdicate their oversight responsibilities in light of the judicial takeover of the capital system. In the first two decades of the post-*Furman* era, executive clemency fell well below pre-*Furman* levels,[84] as governors deferred to the judicial system in policing unjust executions, despite the fact that the courts tended not to review whether particular executions were actually justified.

By the mid-to-late 1990s, the "modern" American death penalty appeared more stable and more robust than the death penalty it replaced. Death sentences and executions rose to their highest levels in years,[85] and the population on death row grew to over three thousand inmates, approximately seven times the size of death row in 1976.[86] To this point, the American death penalty had received the benefits of legal regulation—increased legitimacy and decreased non-judicial scrutiny—but had yet to fully experience its costs.

Over the past fifteen years, the new regime the Court set into motion has been substantially and perhaps irrevocably undermined. The discovery of numerous wrongfully-convicted inmates on death row, in Illinois and elsewhere, has cast a different light on the reliability of the capital system. These exonerations resulted in part from the emergence of more sophisticated technologies for evaluating DNA and other forensic evidence. But they also were an unanticipated consequence of the increased regulation of the death penalty. Many of the exonerations were uncovered because of the efforts of newly-established defense organiza-

81. *Id.* at 206–07.

82. *See* Steiker & Steiker, *Sober*, *supra* note 32, at 436.

83. *See id.* at 438.

84. Franklin E. Zimring, *Inheriting the Wind: The Supreme Court and Capital Punishment in the 1990s*, 20 FLA. ST. U. L. REV. 7, 17 (1992) ("Executive clemency all but disappeared in the United States in the era of hands-on federal court involvement.").

85. *Death Sentences in the United States from 1977 by State and by Year*, *supra* note 76; *Executions by Year Since 1976*, DEATH PENALTY INFO. CENTER (Nov. 13 2012), http://www.deathpenaltyinfo.org/executions-year.

86. *Death Row Inmates by State and Size of Death Row by Year*, *supra* note 57.

tions, such as the Innocence Project (founded in 1992) and Northwestern University's Center for Wrongful Convictions (founded in 1998).

Although these particular organizations do not confine their work to capital cases, much of their success on the capital side is attributable to two new features of the American death penalty—a network of committed capital litigators and the lengthy separation between death sentences and executions. In most capital jurisdictions, specialized death penalty attorneys, investigators, and mitigation experts are involved in the representation of death-sentenced inmates, either through direct representation or through consulting relationships. These attorneys work in a variety of institutional settings, including state-established capital defense organizations, state post-conviction offices, private, non-profit capital defense groups, and federally-funded federal habeas assistance projects. Whereas fewer than a couple of dozen or so attorneys were part of the pre-*Furman* network, a much larger group of lawyers, investigators, and other specialists is involved in contemporary litigation, certainly totaling in the hundreds. Although such lawyers and specialists do not and cannot reach every death-sentenced inmate, they provide a level of scrutiny of capital verdicts and sentences that simply was absent under the prior system.

Moreover, the new capital doctrines, filtered through tiers of review in the state and federal systems, have vastly extended the time between sentence and execution. This gap has been crucial to the exoneration enterprise, as many of those found innocent would simply have been executed under the old regime.[87] The modern death penalty is thus characterized by many more opportunities for, and actual instances of, discovering the fallibility of the capital system. This dynamic—virtually absent in the pre-*Furman* system—contributes to the destabilization of the death penalty.[88]

The other major cost imposed by the modern regulatory system is financial—the exponentially increased expense of trying, housing, and executing capital offenders. During the first two decades of legal regulation, states experienced only a fraction of these increased costs. Although the Court insisted on a constitutional right to "individualized" sentencing in the 1976 cases, capital trials were not transformed over-

87. *See, e.g.*, Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 594 (2005) (noting that one Illinois inmate came "perilously close to execution" prior to his exoneration).

88. *See* Carol S. Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative "Reform" of the Death Penalty?*, 63 OHIO ST. L.J. 417, 425–27 (2002) (discussing the abolitionist potential of "institution-building" reforms, such as the proliferation of specialized capital defender offices).

night. Well into the late 1980s and early 1990s, states did not adequately fund trial representation (often imposing absolute caps on attorneys' fees and expert expenses), and the prevailing level of practice remained poor, particularly in the South.[89] The first interventions by the U.S. Supreme Court on ineffective-assistance-of-counsel grounds did not occur until 2000,[90] and vigorous mitigation development and presentation did not become the norm until the late 1990s at the earliest. At about the same time, states began to fund state post-conviction representation in capital cases, in part to enjoy the benefits of fast-track federal habeas review ("opt-in" status) under the Antiterrorism and Effective Death Penalty Act,[91] though states have not received those benefits to date. Moreover, death-row incarceration costs did not skyrocket until the 1990s. The national death-row population did not reach 1,000 until 1982, 2,000 until 1988, 3,000 until 1995, and 3,500 until 1999 (and it has remained above 3,000 since that time).[92] Furthermore, the solitary-confinement style of death-row incarceration did not become the national norm until recently,[93] and this cost has become an increasingly large part of the added marginal cost of the American death penalty.[94]

Thus, the extraordinary rise in capital costs is a very recent phenomenon, and likely a permanent one. The increased trial, appellate, and post-conviction costs are the product of entrenched legal norms, and the heightened incarceration costs appear to be an unavoidable public policy concession given (perhaps exaggerated) fears of violence on the part of death-sentenced inmates. These increased costs, together with growing public skepticism about the accuracy of the capital system and the near-universal embrace of LWOP as the alternative punishment to death, have radically altered the calculus of prosecutors, who have sought death sentences much less frequently over the past years, sending the

89. *See generally* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

90. Rompilla v. Beard, 545 U.S. 374 (2005); Wiggins v. Smith, 539 U.S. 510 (2003); Williams v. Taylor, 529 U.S. 362 (2000).

91. 28 U.S.C. § 2261 (2006).

92. *Death Row Inmates by State and Size of Death Row by Year*, *supra* note 57.

93. Texas, for example, did not move its death row to the "super-max" facility in West Livingston, Texas, until 1999; prior to that time, Texas death-sentenced inmates were housed in ordinary prison cells and could participate in a work-program. *See Death Row Facts*, TEX. DEPARTMENT CRIM. JUST., http://www.tdcj.state.tx.us/death_row/dr_facts.html (last visited Oct. 19, 2012).

94. *See, e.g.*, Arthur L. Alarcón & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle*, 44 LOY. L.A. L. REV. (SPECIAL ISSUE) S41, S107 n.239 (2011) (indicating that death-row incarceration in California costs an additional $100,663 per death row inmate in 2010, or over $71 million for the 713 death-sentenced inmates on California's death row).

absolute number of death sentences to modern-era lows.[95] Last year marked the first time in the modern era that death sentences nationwide dipped below one hundred, and the seventy-eight death sentences represent less than one-third the number of sentences obtained in any year between 1982 and 1999 (and one-quarter the number obtained in the peak 1994–1996 years).[96] This precipitous decline in death sentences is not attributable to the also-noteworthy decline in murders,[97] as the death-sentencing rate (death sentences per murder) has also declined remarkably over the past thirteen years.[98]

The dramatic decline in death sentencing might reflect a passing moment, much like the decline in the decade leading up to *Furman*. Perhaps a return of the high violent crime rates of the 1970s and 1980s would fuel another explosion in death sentences. But the hallmarks of the modern regime—exorbitant capital costs, increased scrutiny of capital verdicts and sentences through a professionalized capital bar, and the establishment of LWOP as the norm for capital murder—constitute *institutional* pressures against death sentencing. Those institutional pressures, in turn, have a feedback loop to legal regulation. One of the major concerns in *Furman* was the rarity of the death sentences as a response to death-eligible crimes. In the words of Justice White, commenting on the administration of the death penalty in the pre-*Furman* era, "the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice."[99] The increase in death sentencing and executions over the following twenty-five years insulated the death penalty from this sort of challenge, but the recent dramatic declines give contemporary force to that argument. Thus, legal regulation of the death penalty can reduce use of the death penalty, which in turn carries the potential for greater legal regulation, including abolition.

Moreover, the same institutional pressures contributing to the decline in death sentencing have recently led to repeal in several jurisdictions, including New Jersey, New Mexico, Connecticut, and Illinois. These legislative reversals, though significant in themselves, are also significant to the prospects for judicial abolition. Over the past two decades, various members of the Court have expressed increasing doubts about the sustainability of the American death penalty. Justice Black-

95. *Death Sentences in the United States from 1977 by State and by Year*, *supra* note 76.

96. *Id.*

97. *Murder Rates Nationally and by State*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/murder-rates-nationally-and-state (last visited Nov. 13, 2012).

98. Kent Scheidegger, *Death Sentencing Rates*, CRIME & CONSEQUENCES (Dec. 14, 2010, 2:53 PM), http://www.crimeandconsequences.com/crimblog/2010/12/death-sentencing-rates.html.

99. Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring).

mun, a dissenter in *Furman* and a member of the Court that upheld the new statutes in 1976, lamented, just prior to his retirement, that legal regulation of the death penalty had been unsuccessful on its own terms.[100] He announced he would "no longer . . . tinker with the machinery of death" because of the failure of contemporary regulation to solve the problems of arbitrariness and discrimination that justified the Court's intervention in the first place.[101] More recently, Justice Stevens likewise concluded that the death penalty was no longer constitutionally viable.[102] In Justice Stevens' view, the incapacitation justification for the death penalty has been undercut by the introduction of LWOP, the deterrence justification lacks empirical support, and the retributive justification cannot be squared with the trend toward humanizing executions.[103] Other justices have also recently authored opinions lamenting the failure of contemporary regulation to achieve its avowed goals[104] or to be sufficiently responsive to accuracy concerns in light of demonstrated error in capital cases.[105]

Perhaps more importantly, the Court's proportionality cases have developed a new methodology for gauging "evolving standards of decency," and the new measures are particularly hospitable to judicial abolition, especially if more states were to reject the penalty. In *Atkins v. Virginia*, the Court imposed a proportionality bar against executing persons with mental retardation, despite the fact that a majority of death penalty states permitted the punishment.[106] The Court noted that the absolute number of states prohibiting the practice was less significant than the "consistency of the direction of change."[107] Hence, if several more jurisdictions were to defect to the "abolitionist" or "repeal" camp, the Court might view such movement as significant evidence of contemporary rejection of the practice altogether. In subsequent decisions, the Court imposed additional proportionality limitations on the death pen-

100. Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

101. *Id.*

102. Baze v. Rees, 553 U.S. 35, 86 (2008) (Stevens, J., concurring in the judgment). Despite this conclusion, Justice Stevens did agree that under the current constitutional framework the lethal injection protocol at issue did not violate the Eighth Amendment. *Id.* at 87.

103. *Id.* at 78–81.

104. *See* Ring v. Arizona, 536 U.S. 584, 614–19 (2002) (Breyer, J., concurring in the judgment) (cataloging the defects in prevailing capital practice notwithstanding the Court's regulation and urging a requirement that jurors—not judges—make the ultimate determination whether to impose the death penalty).

105. Kansas v. Marsh, 548 U.S. 163, 207–10 (2006) (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting) (calling for a new capital jurisprudence informed by the lessons of wrongful convictions).

106. Atkins v. Virginia, 536 U.S. 304, 315, 321 (2002).

107. *Id.* at 315.

alty, precluding the execution of juveniles[108] and of persons convicted of non-homicidal, ordinary offenses (including the rape of a child).[109] These decisions reflect a shift in emphasis from the number of states embracing a practice to other indicia of prevailing values, including expert opinion, international opinion, polling data, and actual practices. The declining and exceedingly rare use of the death penalty on the ground, in light of these decisions, constitutes powerful evidence of its inconsistency with prevailing moral norms (not to mention expert and international opinion, which are increasingly aligned against capital punishment).

Thus, the modern project of regulating the death penalty has increasingly provided a framework for revisiting the constitutionality of the death penalty itself. Indeed, the legal regulation of the death penalty, adopted as an alternative to constitutional abolition, has provided a yardstick for measuring the death penalty's success. A decision invalidating the death penalty in the early 1970s would have been marked as an abrupt break from prevailing legal norms given the total absence of legal regulation of capital punishment up to that point. Today, the Court can highlight the aspirations of the new legal framework and emphasize the distance between the prevailing reality and those aspirations, much in the way Justices Blackmun and Stevens renounced their constitutional support for the death penalty notwithstanding their prior endorsement of the post-*Furman* schemes.

A number of recent death-penalty scholars have noted the oddity of our prevailing system, in which the death penalty seems ill-suited to survive given the demands of contemporary legal norms and the accompanying crushing costs. David Garland, for example, describes the present American death penalty as "peculiar" given that "the forms through which it is now enacted seem ambivalent and poorly adapted to the stated purposes of criminal justice."[110] Franklin Zimring likewise highlights the "contradiction" between the values underlying the death penalty and those required of due process.[111] But neither of these scholars appeared particularly sanguine about the prospects for abolition in the near future. In Garland's view, the death penalty, dysfunctional though it is, nonetheless serves social purposes *other* than those advertised and in any case is insulated from total abolition by the decentralization of authority over criminal law.[112] Zimring, writing almost a decade ago,

108. Roper v. Simmons, 543 U.S. 551, 578 (2005).

109. Kennedy v. Louisiana, 554 U.S. 407, 413 (2008).

110. GARLAND, *supra* note 17, at 13.

111. FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 130 (2003).

112. *See* GARLAND, *supra* note 17, at 184–86.

was observing the zenith of capital sentencing and executions, and though he expressed confidence in the eventual abolition of the death penalty,[113] the trajectory of the late 1990s did not seem promising. Today, the conflict between the legal regulation of the death penalty and its continued use appears more permanent and more destructive than the early decades of regulation would have predicted. In short, the modern American death penalty—with its unprecedented costs, alternatives, and legal regulatory framework—seems newly vulnerable to judicial invalidation. Reform of the death penalty and its abolition might well be on the same path.

113. ZIMRING, *supra* note 111, at 205 (stating that "the ultimate outcome [of abolition] seems inevitable in any but the most pessimistic view of the American future").